

(4) 15-3
PETITION FOR WRIT OF CERTIORARI
In the
Supreme Court of the United States

OCTOBER TERM, 1944

No. 465

SKINNER MANUFACTURING COMPANY,
A Nebraska Corporation,

Petitioner,

vs.

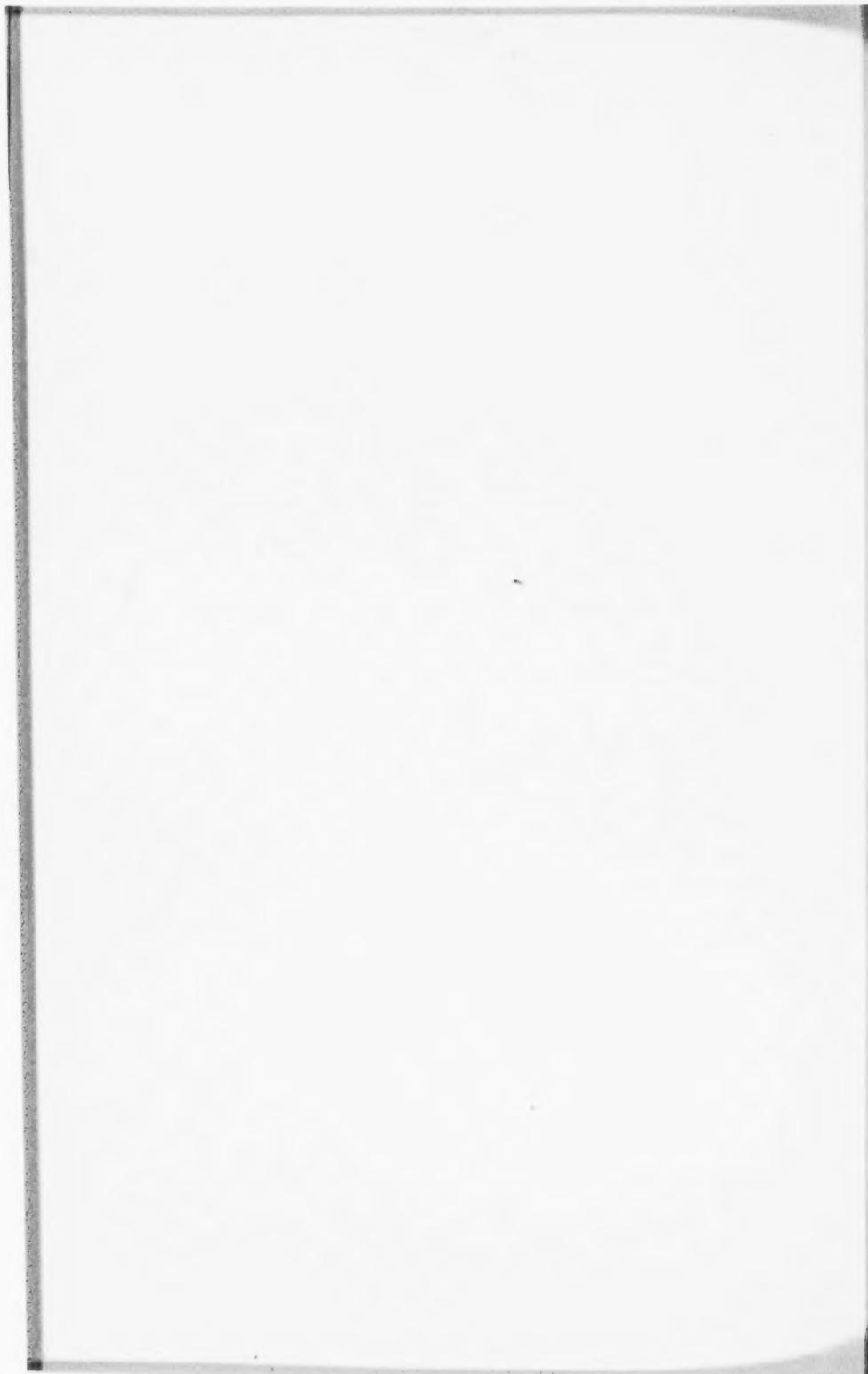
KELLOGG SALES COMPANY,
a Michigan Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT AND BRIEF
IN SUPPORT THEREOF

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INDEX

PETITION FOR WRIT OF CERTIORARI

	Pages
I. Summary and Short Statement of Matter Involved....	1-16
Nature of Case.....	2
Pleadings	2
Evidence	3-11
Trial Court's Conclusions, Findings, Opinion and and Decree	11-14
Grounds for Appeal to Circuit Court of Appeals..	14
Decision of United States Circuit Court of Appeals for Eighth Circuit	15-16
Petition for Writ of Certiorari.....	16
II. Basis upon which it is Contended United States Supreme Court has Jurisdiction to Review.....	17
III. Questions Presented	17-20
IV. Reasons Relied upon for Allowance of Writ.....	20-25

BRIEF IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI

REPORTS OF OPINIONS IN COURTS BELOW.....	26-27
JURISDICTION	27
STATEMENT OF CASE.....	27
SPECIFICATIONS OF ERRORS INTENDED TO BE URGED.....	27
APPLICABLE DECISIONS, STATE OR FEDERAL.....	28
FOREWORD	28-30
ARGUMENT	30-115
1. Rule of Civil Procedure No. 52 did not change old right to review findings of fact on appeal..	30-34
Conflict in decision of Circuit Courts of Appeal	33-34
2. Term "Rainin-BRAN" standing alone was not a primary generic name.....	34-36

INDEX—(Continued)

	Pages
3. This case governed by rules laid down in Coca-Cola Case, not by decision in Shredded Wheat Case	36-45
4. Term "Raisin-BRAN" was capable of acquiring a secondary meaning..... Cases bearing on subject distinguished (Note 22 of Appendix).....	45-56 142
5. Trade-mark or trade name may acquire secondary meaning during time when applied to product which has no competition.....	56-59
6. Quantum of proof necessary to establish secondary meaning	59-62
7. Testimony of sales representatives of Petitioner and grocers with wide experience competent to show public understanding of term "Raisin-BRAN"	62-63
8. The term "Raisin-BRAN" acquired a secondary meaning	63-86
Definition of secondary meaning.....	64-65
Merchandising methods of Petitioner.....	65-67
Understanding of public required to show secondary meaning	67-70
Testimony re understanding of public	70-79
Legal effect of evidence re secondary meaning "Raisin-BRAN" did not become <i>publici juris</i>	79-82
Court of Appeals erred in refusing to review evidence	82-85 85-86
9. Respondent had no right to use of term "Raisin-BRAN"	86-87
Use by Respondent of term "Raisin-BRAN" on infringement	86-87
Registration under 1920 Trade Mark Act no excuse for infringement	87
10. Trial Court erred when it found Respondent had done all necessary to distinguish its product from Petitioner's, and Court of Appeals erred when it refused to review such finding.....	87-94

INDEX—(Continued)

	Pages
Use of word "Kellogg's".....	88-91
Use of white packages with green lettering	91-92
Use of figures "40%".....	92-93
11. Error in findings no confusion or palming off..	94-103
Confusion	95-99
Palming Off	100-103
12. Error in finding no likelihood of confusion and palming off	103-111
Evidence of Respondent's intention to deceive.	104-108
Erroneous conclusions of Trial Court.....	108-110
13. Equities in this case favor Petitioner, not Respondent	111-113
14. Petitioner entitled to relief prayed for.....	113-116
CONCLUSION	116-117
BLANK PAGE.....	118

APPENDIX

(Pages 119 to 146)

Note 1. Evidence with respect to Petitioner's business and business methods	119
Note 2. Evidence with respect to Respondent's business and business methods	119
Note 3. Consumer witnesses, testimony analyzed.....	119-121
Note 4. Retail grocer witnesses, testimony analyzed.....	121-123
Note 5. Wholesale grocer witnesses, testimony analyzed..	123
Note 6. Prior to its adoption by Petitioner in June 1925, the term "Raisin-BRAN" had never been applied to any food product on the American market	123-125
(a) Consumer witnesses who testified that name had not been applied to any other breakfast food	123-124
(b) Retail grocers who so testified.....	124

	Pages
(c) There was no evidence that name had been applied to any other food product prior to 1925.....	124-125
Note 7. The Petitioner's attempt to register the trade-mark under the 1905 Trade Mark Act and its sub- sequent registration under 1920 Trade Mark Act did not preclude term "Raisin-BRAN" from acquiring a secondary meaning.....	125-126
Note 8. Petitioner's trade-mark use on its packages....	126
Note 9. Early design for label and early proposed designation for Respondent's product	127
Note 10. Steps in development of label for Respondent's product	127-132
Note 11. Testimony of witnesses who said they were not con- fused	133
Note 12. Testimony of witnesses who answered the question "What does the term 'Raisin Bran' mean?"	133
Note 13. Testimony of retail grocer witnesses who said they didn't know of any confusion.....	136
Note 14. Section 240 (a) of Judicial Code.....	136
Note 15. Federal Rule of Civil Procedure 52.....	136
Note 16. Federal Rule of Civil Procedure 1.....	137
Note 17. c. 651, 48 Stat. 1064.....	137
Note 18. Ten year clause of 1905 Trade Mark Act.....	138
Note 19. Section 16 of the 1905 Trade Mark Act.....	140
Note 20. Section 17 of the 1905 Trade Mark Act.....	141
Note 21. Section 6 of the 1920 Trade Mark Act.....	141
Note 22. Cases cited by Lower Courts and Respondent classi- fied and distinguished.....	142

TABLE OF CASES

A

Pages

<i>Actna Life Insurance Co. v. Kepler</i> , 116 F. 2d 1.....	85
<i>American Brake Shoe & Foundry Co. v. Alltex Products Corp.</i> , 117 F. 2d 983.....	142, 143
<i>American Druggists' Syndicate v. U. S. Industrial Alcohol Co.</i> , 2 F. 2d 942.....	145
<i>Amoskeag Mfg. Co. v. Trainer</i> , 101 U. S. 51, 25 L. Ed. 993.....	142
<i>Armstrong Mfg. Co. v. Ridge Tool Co.</i> , 132 F. 2d 158.....	142
<i>Armstrong Paint & Varnish Works v. Nu-Enamel Corp.</i> , 305 U. S. 315, 83 L. Ed. 195.....	305
<i>Auto Acetylene Light Co. v. Presto-Lite Co.</i> , 216 F. 810.....	98

B

<i>Barton v. Rex Oil Co.</i> , 29 F. 2d 474.....	22, 24, 47, 49, 51, 59, 61, 65, 79
<i>Bayer Co. v. United Drug Co.</i> , 272 F. 505.....	82
<i>Beckwith v. Commissioner of Patents</i> , 252 U. S. 538.....	145
<i>Beneficial Ind. Loan Corp. v. Kline</i> , 132 F. 2d 520.....	44, 115
<i>Bergman v. Northern Pacific Railway Co.</i> , 14 Fed. 2d 580.....	77, 99
<i>Birmingham Vinegar Co. v. Powell</i> , (Eng.) A. C. 1897, p. 710 66 L. J. (Ch.) N. S. 763, 1897, L. R. H. L. 710.....	61, 69, 79
<i>Bisceglia Bros. v. Fruit Industries, Ltd.</i> , 20 F. S. 564.....	126
<i>Bliss, Fabyan & Co. v. Aileen Mills, Inc.</i> , 25 F. 2d 370.....	143
<i>Brennan v. Emery-Bird-Thayer Dry Goods Co.</i> , 108 F. 624.....	143
<i>British-American Tobacco Co. v. British-American Cigar Stores Co.</i> , 211 F. 933	114
<i>Brooten v. Oregon Kelp Ore Products Co.</i> , 24 F. 2d 496.....	143
<i>Brown Chemical Co. v. Meyer</i> , 137 U. S. 540, 35 L. Ed. 247.....	142
<i>B. F. D. Co. v. Montgomery Ward Co.</i> , D. C. Ill., 16 T. M. R. 432, .74	

C

<i>Canadian Shredded Wheat Co. Ltd. v. Kellogg Co. of Canada Ltd.</i> , 55 R. P. C. 125.....	39
<i>Canal Co. v. Clark</i> , 80 U. S. (13 Wall) 311, 20 L. Ed. 581.....	46, 142
<i>Caron Corp. v. Conde, Ltd.</i> , 213 N. Y. S. 735.....	50
<i>Cellular Clothing Co. v. Maxton & Murray</i> , 25 Ct. Sess. Cas. 4th Ser. 1908, 35 Se. L. R. 869; 15 R. P. C. 602, 80 L. T. N. S. 809 57, 58, 60, 61, 143, 145	
<i>Celluloid Mfg. Co. v. Cellonite Mfg. Co.</i> , 32 F. 94.....	98
<i>Centaur Co. v. Heinsfurter</i> , 84 F. 955.....	146
<i>Chivers, S., & Sons v. S. Chivers & Co., Ltd.</i> , 17 R. P. C. 420.....	60, 144
<i>Cleo Syrup Corp. v. Coca Cola Co.</i> , 48 F. S. 565, 139 F. 2d 416 15, 21, 30, 33, 44, 49, 104	

<i>Coca Cola Co. v. Chero-Cola Co.</i> , 273 F. 755.....	98
<i>Coca Cola Co. v. Gay-Ola Co.</i> , 200 F. 720.....	99
<i>Coca Cola Co. v. Koke Co.</i> , 254 U. S. 143, 41 S. Ct. 113, 65 L. Ed. 189.....	12, 18, 23, 37, 41, 43, 44, 47, 49, 51, 60, 68, 72
<i>Coca Cola Co. v. Nehi Corp.</i> —Del.—36 A. 2d, 156.....	50
<i>Coca Cola Co. v. Old Dominion Beverage Co.</i> , 271 F. 600.....	24, 59, 61, 79
<i>Coca Cola Co. v. Stevenson</i> , 276 F. 1010.....	87, 90
<i>Collins, J. N., Co. v. F. M. Paist Co.</i> , 14 F. 2d 614.....	99
<i>Collis Co. v. Consolidated Machine Tool Corp.</i> , 41 F. 2d 641.....	146
<i>Computing Scale Co. v. Standard Computing Scale Co.</i> , 118 F. 965.....	142
<i>Coradon Co. v. Schneider</i> , 47 F. S. 735.....	143
<i>Corpus Juris Secundum</i> , Vol. 32, Sec. 1025, p. 1062.....	125
<i>Cridlebaugh v. Rudolph</i> , 131 F. 2d 795.....	143, 146

D

<i>Davids, Thaddeus v. Davids Mfg. Co.</i> , 233 U. S. 461.....	41
<i>Davis, R. B., Co. v. Sher</i> , 125 N. J. E. 316, 5 A. 2d 49	
47, 49, 50, 61, 65, 80, 98	
<i>De Griselle v. Gans</i> , 116 Nebr. 835, 219 N. W. 235.....	77, 99
<i>Derenberg, Trade Mark Protection</i>	61, 79
<i>Diamond Match Co. v. Saginaw Match Co.</i> , 142 F. 727.....	146
<i>District of Columbia v. Pace</i> ,—U. S.—, 88 L. ed. 319.....	31
<i>Dixie Cola Lab. v. Coca Cola Co.</i> , 117 F. 2d 352.....	45, 50
<i>Dixiepig Corp. v. Pig Stand Co.</i> , (Civ. App. Tex. 1930) 31 S. W. 2d 325	144
<i>Dry Ice Corp. v. Louisiana Dry Ice Corp.</i> , 54 F. 2d 882.....	82, 146
<i>Dunhill v. Bartlett & Bickley</i> , 39 R. P. C. 426, (Ch. Div. 1922).....	93
<i>DuPont Cellophane Co. v. Waxed Products Corp.</i> , 85 F. 2d 75	
53, 59, 60, 143, 144, 146	

E

<i>Eastern Wine Corp. v. Winslow-Warren Ltd., Inc.</i> , 137 F. 2d 955	
21, 34	
<i>Elgin National Watch Co. v. Illinois Watch Co.</i> , 179 U. S. 665, 45 L. Ed. 365.....	42, 46, 48, 145
<i>Elgin National Watch Co. v. Loveland</i> , 132 F. 41.....	48, 145
<i>Equitable Life Assurance Soc. of the U. S. v. Ireland</i> , 123 F. 2d 462	21, 33, 86
<i>Ex Parte Bailey Meter Co.</i> , 487 O. G., 675, 36 U. S. P. Q. 294.....	145
<i>Ex Parte Bardons & Oliver, Inc.</i> , 42 U. S. P. Q. 632.....	145
<i>Ex Parte Combustion Engineering Co.</i> , 43 U. S. P. Q. 191.....	145
<i>Ex Parte Hartog</i> , 49 U. S. P. Q. 121.....	145
<i>Ex Parte Railley Corp.</i> , 42 U. S. P. Q. 472.....	145
<i>Ex Parte Reo Motor Car Co.</i> , 241 O. G. 4, 16 F. 2d 194.....	145

F

<i>Fairbanks, N. K., Co. v. R. W. Bell Mfg. Co.</i> , 77 F. 869.....	98, 115
<i>Fairbanks, N. K., Co. v. Luckel, King & Cake Soap Co.</i> , 102 F. 327	87, 91, 92
<i>Fawcett Publications v. Popular Mechanics Co.</i> , 80 F. 2d 194.....	142
<i>Federal Rules of Civil Procedure</i> , 1, 52, 28 U. S. C. foll. Sec. 723(c) p. 677, 678.....	30, 31, 33, 136
<i>Feil v. American Serum Co.</i> , 16 F. 2d 88.....	47, 49, 94
<i>Fels v. Christopher-Thomas & Bros.</i> , 21 R. P. C. 85.....	143
<i>Fitch, F. W., Co. v. Camille, Inc.</i> , 106 F. 2d 635.....	43, 44, 47, 49, 62, 65, 80, 98, 99, 102, 103, 109
<i>Flagg Mfg. Co. v. Holway</i> , 178 Mass. 83, 59 N. E. 667.....	146
<i>Florence Mfg. Co. v. J. C. Dowd & Co.</i> , 178 F. 73.....	98
<i>Fort St. George, in re</i> , 22 F. 2d 195.....	78
<i>Fuller v. Huff</i> , 104 F. 141.....	87, 91, 92, 115

G

<i>Gaidry Co. v. McIlhenny Co.</i> , 253 F. 613.....	126
<i>Gerbron, Inc., v. Gerbron Cleaners</i> , 45 F. S. 150.....	99, 104
<i>Gervais Cheese Case</i> , 24 U. S. Trade Mark Bull. No. 6 p. 157	
	80, 81, 82
<i>Goodyear's India Rubber Glove Mfg. Co. v. Goodyear India Rubber Co.</i> , 128 U. S. 598, 32 L. Ed. 535.....	142
<i>Grocers Baking Co. v. Sigler</i> , 132 F. 2d 498.....	24, 61, 62, 80
<i>Gustavino, R., Co. v. Comerma</i> , 180 F. 920, 184 F. 549.....	47, 49, 50, 65, 87, 90
<i>Guggenheim v. Cantrell & Cochrane</i> , 10 F. 2d 895.....	104

H

<i>Heddon's, James, Sons v. Millsite Steel & Wire Co.</i> , 128 F. 2d 6.....	142
<i>Helmet Co. v. Wm. Wrigley, Jr. Co.</i> , 245 F. 824.....	104
<i>Hiralt Walker & Sons v. Penn-Maryland Corp.</i> , 79 F. 2d 836.....	145
<i>Holt v. Metropolitan Refining Co.</i> , 9 F. S. 662.....	61, 79
<i>Horlick Malted Milk v. Summerskil</i> , 85 L. J. R. 338.....	143
<i>Houston v. Berde</i> , (Minn.) 2 N. W. 2d 9.....	142
<i>Howe Scale Co. v. Wyckoff, Seamans & Benedict</i> , 198 U. S. 118.....	46, 47
<i>Huffman v. Buckingham Transportation Co.</i> , 98 F. 2d 916.....	79
<i>Hygeia Dist. Water Co. v. Hygeia Ice Co.</i> , 70 Conn. 516, 40 At. 534, .63	

I

<i>Inderrieden Canning Co., In re</i> , 277 F. 613.....	98
<i>Industrial Rayon Corp. v. Dutchess Underwear Corp.</i> , 92 F. 2d 33.....	22, 47, 49

Pages

<i>In re American Cyanide & Chemical Corp.</i> , 99 F. 2d 964.....	126
<i>In re Archer Hosiery Mills</i> , 134 F. 2d 239.....	145
<i>In re Hartog</i> , 49 U. S. P. Q. 121.....	145
<i>In re Irving Drew</i> , 297 F. 889.....	145
<i>In re Swan & Finch Co.</i> , 259 F. 991.....	145

J

<i>Jamieson & Co. v. Jamieson</i> , 15 R. P. C. 169.....	144
<i>Jarvis, P. M. v. Shackleton Inhaler Co.</i> , 136 F. 2d 116.....	21, 33
<i>Jell-Well Dessert Co. v. Jell-X-Cell Co.</i> , 22 F. 2d 522.....	142
<i>Judicial Code</i> , Sec. 240(a).....	17, 27, 136

K

<i>Keasbey v. Brooklyn Chemical Works</i> , 142 N. Y. 467, 37 N. E. 476.....	45, 59, 61, 62, 79
<i>Kellogg Co. v. National Biscuit Co.</i> , 305 U. S. 111, 83 L. Ed. 73 12, 18, 23, 36, 38, 39, 40, 44, 46, 48, 52, 59, 60, 67, 142, 143, 146	
<i>Kellogg Toasted Corn Flake Co. v. Quaker Oats Co.</i> , 235 F. 657 22, 57, 58, 59, 60, 61, 142, 143, 145	
<i>Klaber v. Lakeman</i> , 64 F. 2d 86.....	32
<i>Krank, A. J., Mfg. Co. v. Pabst</i> , 277 F. 15.....	143
<i>Kuhn v. Princess Lida of Thurn & Taxis</i> , 119 F. 2d 704.....	21, 33, 86

L

<i>Lawrence Mfg. Co. v. Tennessee Mfg. Co.</i> , 138 U. S. 537, 34 L. Ed. 997.....	142
<i>Leonard v. St. Joe Lead Co.</i> , 75 F. 2d 390.....	125
<i>Linoleum Mfg. Co. v. Nairn</i> , 7 Ch. Div. 834.....	142, 146
<i>Little v. Kellam</i> , 104 F. 353	98
<i>Little Tavern Shops v. Davis</i> , 116 F. 2d 903.....	24, 54, 74, 80, 87, 90
<i>Long, W. E., v. U. S. Bakery</i> , 28 U. S. P. Q. 520.....	145
<i>Lorillard, P. v. Peper</i> , 86 F. 956.....	143

M

<i>Macy, R. H., Co. v. Colorado Clothing Mfg. Co.</i> , 68 F. 2d 690.....	93
<i>Majestic Sec. Corp. v. Coll. of Int. Rev.</i> , 120 F. 2d 12.....	125
<i>Matthews Conveyor Co. v. Palmer-Bee Co.</i> , 135 F. 2d 73.....	146
<i>Menendez v. Holt</i> , 128 U. S. 514, 32 L. Ed. 526.....	90
<i>Metz, H. A., Lab. v. Blackman</i> , 153 Misc. 171, 275 N. Y. S. 407.....	52
<i>Mirrolite Mfg. Co. v. DeVoe & Reynolds Co., Inc.</i> 3 F. 2d 847.....	

144, 145

N

Nashville Syrup Co. v. Coca Cola, 215 F. 527 . . . 22, 42, 47, 49, 59, 65
Natural Food Co. v. Williams, 20 App. D. C. 348 37
New England Awl & Needle Co. v. Marlboro Awl & Needle Co.,
 168 Mass. 154, 46 N. E. 386 61, 79
Nims on Unfair Competition, 3 Ed., Sec. 37, 324, 328, 42, 417a
 69, 93
No-D-Ka Dentifrice Co. v. S. S. Kresge Co., 24 F. 2d 726 145
North Carolina Railroad v. C. D. Storey, Sheriff, 268 U. S. 288 . . . 32
Northam Warren Corp. v. Universal Cosmetic Co., 18 F. 2d 774 . . . 98
N. Y. Law Quarterly, Vol. 16, p. 366 37

O

Ohio Baking Co. v. National Baking Co., 127 F. 116 98
Owen v. Carmichael's Auto Co., (Col. 1931) 2 P. 2d 580 125

P

Parsons Bros. v. John Gillespie Co., 15 R. P. C. 57 (1897) . . . 143, 144
Pecheur Lozenge Co. v. National Candy Co., 315 U. S. 666, 86
 L. Ed. 1103, 122 F. 2d 318 109
Penney, J. C., Co. v. H. D. Lee Mercantile Co., 120 F. 2d 949 . . . 146
Pfeifer Oil Transp. Co., Inc., v. I. S. Bushey et al., 129 F. 2d 607 . . . 21, 33
Pillsbury v. Pillsbury Washburn Flr. Mills Co., 64 F. 841 98, 99
Pope Automatic Merchandising Co. v. M'Crum-Howell Co., 191
 F. 979 146
Popular Mechanics Co. v. Fawcett Publications, Inc., 1 F. S. 292 . . . 126
Postum Cereal Co. v. American Health Food Co., 119 F. 848 143

Q

Quaker Oats Co. v. General Mills, Inc., 134 F. 2d 429 145
Queen Mfg. Co. v. Isaac Ginsburg & Bros. Co., 25 F. 2d 284 . . . 109

R

Radio Corporation of America v. Radio Eng. Labs., 293 U. S. 1 . . . 32
Razlinson v. Brainard & Armstrong, 28 Misc. Rep. 287, 59 N.
 Y. S. 880 47, 49, 65
Reddaway v. Banham, 13 R. P. C. 218 (1896) 46, 63, 74
Reid, Murdoch, v. H. P. Coffee Co., 48 F. 2d 817 99, 109, 110
Restatement of the Law of Torts, Vol. 3, Sec. 717, Comment a.
 Sec. 735, 716 52, 60, 69, 87
Richmond Remedies Co. v. Dr. Miles Med. Co., 16 F. 2d 598 . . . 143, 145

	Pages
S	
<i>Saalfield Pub. Co. v. Merriam Co.</i> , 238 F. 1.....	22, 58, 70, 74, 87, 90
<i>Saccharino Case</i> , 24 U. S. Trade Mark Bull. No. 6, p.	158-159
	80, 81, 82
<i>Saxlehner v. Siegel-Cooper Co.</i> , 179 U. S. 42, 45 L. Ed. 77.....	99
<i>Saxlehner v. Wagner</i> , 216 U. S. 375, 54 L. Ed. 525.....	143, 145
<i>Sears, Roebuck & Co. v. Elliott Varnish Co.</i> , 232 F. 588.....	143
<i>Shaler Co. v. Rite-Way Products, Inc.</i> , 107 F. 2d 82.....	22, 47, 49
<i>Shredded Wheat Company's Trade Mark</i> , 55 R. P. C. 271, Aff'd	
H. of L. 57 R. P. C. 137.....	39
<i>Singer Mfg. Co. v. June Mfg. Co.</i> , 163 U. S. 169, 41 L. Ed. 118.....	146
<i>Skelly Oil Co. v. Powerine Co.</i> , 86 F. 2d 752.....	94
<i>Southern R. R. Co. v. Stewart</i> , 119 F. 2d 85.....	125
<i>Spicer v. W. H. Bull Medicine Co.</i> , 49 F. 2d 980.....	143
<i>Standard Paint Co. v. Trinidad Asphalt Mfg. Co.</i> , 220 U. S.	
446, 55 L. Ed. 536.....	15, 16, 46, 47, 55, 56, 145
<i>Standard Scale Co. v. Standard Computing Scale Co.</i> , 118 F. 965.....	142
48 Stat. 1064, C 651, Secs. 1 and 2.....	32, 137
<i>Steem-Electric Corp. v. Herzfeld Phillipson Co.</i> , 118 F. 2d 122	
	144, 145, 146
T	
<i>Texas Agr. Ass'n, etc. v. Hidalgo Co., etc.</i> , 125 F. 2d 829.	21, 33
<i>Trade Mark Act of 1905</i> (15 U. S. C. A., Sec. 96) Sec. 16, 17	
17, 27, 37, 42, 43, 125, 126, 138, 140, 141	
<i>Trade Mark Act of 1920</i> (15 U. S. C. A., Sec. 126).....	
3, 12, 14, 17, 27, 38, 42, 43, 53, 87, 125, 141	
<i>Trappey v. M'Ilhenny Co.</i> , 281 F. 23.....	87, 90, 126
<i>Trinidad Asphalt Mfg. Co. v. Standard Paint Co.</i> , 163 F. 977	
aff'd 220 U. S. 446.....	55
U	
<i>Ungles-Hoggette Mfg. Co. v. Farmers Hog & Cattle Powder Co.</i> , 232 F. 116.....	145
<i>United States Trade Mark Ass'n Bulletin</i> , Vol. 24, p.	157
	80, 81, 82
<i>Unkle v. Wiles</i> , 281 F. 29.....	32
V	
<i>Viavi Co. v. Vimedia Co.</i> , 245 F. 289.....	142

Pages

W

<i>Walgreen Drug Stores v. Obear-Nestor Glass Co.</i> , 113 F. 2d 956	143
<i>Ward Baking Co. v. Potter Wrightington, Inc.</i> , 298 F. 398	98
<i>Warner, W. R., & Co. v. Eli Lilly & Co.</i> , 265 U. S. 526, 68 L. Ed. 1161	46, 47, 143
<i>Wellcome v. Thompson & Capper</i> , 1 L. R. (Ch. Div. 1904) 736	45
<i>Window Glass Machine Co. v. Pittsburgh Plate Glass Co.</i> , 46 F. 2d 484; 284 F. 645	78, 99
<i>Wire Glass Co. v. Continuous Glass Co.</i> , 79 N. J. E. 277, 81 At. 374	145, 146
<i>Wornova Mfg. Co. v. McCawley</i> , 11 F. 2d 465	143
<i>Wotherspoon v. Currie</i> , 5 L. R. Eng. & Irl. App. 508	46
<i>Wrisleys, Allen B., Co. v. Iowa Soap Co.</i> , 122 F. 796	143

Z

<i>Zangerle & Peterson Co. v. Venice Furniture Novelty Mfg. Co.</i> , 133 F. 2d 266	146
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Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT AND BRIEF
IN SUPPORT THEREOF**

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Your Petitioner, Skinner Manufacturing Company, a Nebraska corporation of Omaha, Nebraska, respectfully prays that a Writ of Certiorari issue to review a de-

cision of the United States Circuit Court of Appeals for the Eighth Circuit, affirming a decree entered by the United States District Court, District of Nebraska, Omaha Division, in the above-mentioned matter; and with respect thereto your Petitioner represents as follows:

I.

Summary and Short Statement of the Matter Involved.

Nature of Case.

This is a case in which the Petitioner charges the Respondent with infringement of Petitioner's trade-mark "Raisin-BRAN" as applied to a dry prepared breakfast food distributed by Petitioner.

Pleadings.

In its prayer for relief, Petitioner prays, "that the Court issue an order permanently "enjoining * * * the defendant from using plaintiff's trade-mark and label and from advertising * * * and selling * * * any cereal food product under the designation 'Raisin Bran' * * * and from in any way infringing * * * plaintiff's right to the exclusive use and enjoyment of its trade-mark * * *" (T. 7-8). The Respondent alleged that the term "Raisin Bran" was so descriptive of Petitioner's product that the term could not be exclusively appropriated and that the term had not acquired a secondary meaning and Respondent denied any infringement of Petitioner's mark.

1 In this Brief, A. with numbers following it indicate the Notes in the Appendix where reference to the Transcript will be found; F. stands for Finding or Findings of Fact; C. stands for Conclusion or Conclusions of Law; E. stands for Exhibit or Exhibits; T. stands for Transcript of Record.

The Evidence.

In June 1925, the Petitioner introduced on the American market for the first time a packaged dry prepared breakfast food composed of cereal flakes similar to products popularly known as "bran flakes," and with which whole seedless raisins were mixed (T. 217-221). This product was never patented (T. 221).

The petitioner adopted and applied to this product the term "Raisin-BRAN," standing alone, and used and claimed this term as a trade-mark for its said product (T. 217-220). Prior to this, the term "Raisin-Bran," standing alone, had never been applied to any such product (A. 6), and had no commonly understood meaning (F. 8, T. 144), and as the Trial Court found, "There is no such product or thing as the bran of a raisin. Nor is there any product or thing which may ordinarily and logically be characterized as a 'raisin bran'" (F. 8, T. 144).

The Petitioner registered the term "Raisin-BRAN" in the United States Patent Office under the Trade-Mark Act of March 19, 1920 (c. 104, 41 Stat. 533), (T. 293, 294; A. 8), and continuously thereafter placed its mark "Raisin-BRAN" at the top of the front label of each package of its product and under the mark carried the statement "Trade-Mark" and at the bottom of each label carried the statement "An exclusive product distributed by Skinner Manufacturing Company, Omaha, Nebraska" (E. 3, 4, 5, 6, 7, 8, 9, 10 and 21, Def's Ex. 31; T. 294, 295, 307, 1295, 1297). The petitioner also used its mark as a trade-mark in its advertising (T. 237-242, 815-816, 1229-1241, 1281-1282), and never intentionally used its own name in immediate connection with its mark and always discouraged others from doing so (F. 18, T. 151-152), and Petitioner never used any other mark as a trade-mark for its

product (E. 31a to z, 31-a-1 to z-1, 31-aa to yy all inclusive) (T. 237-242, 242, 815, 1226-1229, 1243, 1281, 1282).

For many years prior to 1942, the background of the label on the packages containing Petitioner's product had been diagonal stripes of blue, white and yellow, with the white background predominating in that portion of the label upon which the mark "Raisin-BRAN" appeared in dark letters (E. 3, 4, 5, 6, 7, 8, 9, 10, 295). At all times, Petitioner on its packages, and frequently in its advertising, used a distinctive design of its trade-mark where the word "Raisin" was on one line, the word "BRAN" just below it, and the "R" of the "Raisin" was larger than other letters and extended down into the line in which the word "BRAN" appeared (E. 3 to 10 inclusive, 295, 31a to z, 31a-1 to z-1, 31aa to yy, all inclusive).

From June 1925 to April 1942, Petitioner had no competition for its product (T. 220, 224, 316) and had the exclusive use of its mark "Raisin-BRAN" as a designation for a breakfast food product (T. 220), and during that period expended many thousands of dollars advertising its product and its mark "Raisin-BRAN", had an extensive sales force representing it, and by April 1942 had established a large and profitable business in its said product in all parts of the United States (E. 11, T. 296; E. 2043, T. 808; F. 19, T. 152-153, E. 24, T. 229, 230; T. 803-805; E. 14, T. 296-305; E. 2042, T. 806-807; T. 273, 274).

In April 1942, the Respondent, Kellogg Sales Company, and General Foods Sales Company, Inc., both introduced on the market products containing so-called "bran flakes" with which raisins were mixed. The Respondent designated its product as "Kellogg's Raisin 40% Bran

Flakes," General Foods designated its product "Post's Raisin Bran" (E. 203, T. 1293; T. 316, 945; 52 F. S. p. 437). Both of said companies immediately engaged in intensive radio and newspaper advertising campaigns (E. 511, 512-A-B, T. 316-317, 318, 319, 910, 52 F. S. p. 437).

The Respondent has for many years been a large distributor of breakfast food products, particularly "All Bran" and "Bran Flakes"; in 1942, Respondent was the largest distributor of breakfast food products in the United States, its products were in a major portion of the grocery stores of the United States, and it has spent millions of dollars advertising its products under its trade name "Kellogg's" which was well known to most of the purchasing public (T. 935-936). The Respondent had packaged many of its products in packages with a white background upon which the product names were in green letters and the word "Kellogg's" appeared in red letter script (E. 616, 617, 618, 619, T. 312, 313, 348, 349, 930, 931, 932, 933, 906-908, 1014, 1015, 1016). These packages were not, however, so uniform as to be instantly recognized as emanating from the Respondent (E. 507, 616-Y, Z, AA, BB, CC, DD, EE, 617, 618, 619, T. 312-313), and until April 1942, Respondent's "Bran Flakes" product had always been packaged in a package with a red and yellow background with the product name in black letters (E. 616-Y, Z, AA, BB, CC, DD, EE, T. 312, 313).

The label on the package in which Respondent introduced its product which it designated "Kellogg's Raisin 40% Bran Flakes" had a white background and the words "Raisin 40% Bran Flakes" were in dark letters, the "R" of "Raisin" ran down into the second line in which the word "Bran" appeared, in a manner similar

to the "R" on Petitioner's label, the 40% was in smaller lined type so as to be inconspicuous, and the arrangement and important features of Respondent's label were otherwise strikingly similar to Petitioner's label, even to an almost exact simulation of Petitioner's slogan, "Cereal and Fruit" (E. 203, 295A-B, T. 1293; 1295, 1297; also see A9, 10).

Following the introduction of Respondent's product many retail grocers advertised it merely as "Raisin Bran" and others advertised it as "Kellogg's Raisin Bran" or "Raisin Bran, Kellogg's," but in many instances the word "Kellogg's" was in much smaller print than the words "Raisin Bran" (E. 333, 334, T. 722, 723, 678, 711, 1027, 1085, 1222, 1225-1226). Out of 54 grocer witnesses who testified that they waited on customers, as opposed to self-service stores (A. 4a), 21 testified that after April 1942, on an order for "Raisin Bran" they delivered whichever was handiest or most profitable, etc. (T. 380, 426, 444, 501, 505, 526, 540, 635, 653, 698, 738-739, 756-757, 773, 835, 839, 877, 1126, 1189, 1203, 1208), although 41 of these witnesses testified that before the advent of the Post and Kellogg products their customers called for Petitioner's product under the designation "Raisin Bran" (A. 4f), and 26 of these witnesses testified that when their customers asked for just "Raisin Bran," it was Petitioner's product they desired (A. 4g).

General Foods covered a large territory in the sale of its "Post's Raisin Bran" (52 F. S. p. 437), but the Respondent confined its sales during the first year to a small territory (T. 909, 897), and although only about \$20,000.00 worth of business was done by Respondent when Petitioner's evidence was taken (T. 935), the evidence dis-

closed 9 consumers who were definitely confused between Petitioner's and Respondent's packages, by Respondent's use of the term "Raisin Bran" (A. 3i); and two retail grocers testified that their customers had been confused (T. 686, 703). To offset this, the Respondent adduced evidence of consumer witnesses who said they were not confused (A. 11), and of others, both consumers, retailers and wholesalers, who, after looking at the two packages, generally placed side by side, said they would not be confused (A. 11), and of retailers who testified they did not know of any of their customers who were confused (A. 13).

All of the testimony was taken after General Foods and the Respondent had initiated their intensive radio and newspaper advertising campaigns which were well calculated to break down the understanding of the consuming public that the term "Raisin Bran" signified a single thing coming from a single source, and to lead consumers to understand that "Raisin Bran" meant the product of any one of the then three distributors.

The Petitioner introduced evidence which showed that it had received thousands of letters from users of its product which proved that they understood that the Petitioner was the source of origin of "Raisin-BRAN" (E. 43, T. 309, 232, 234, 810).

The oral testimony which bears upon the issue as to whether or not Petitioner's trade-mark "Raisin-BRAN" acquired a secondary meaning is not of a nature which could be truly called conflicting. It comes from 137 consumer witnesses, 4 of whom appeared before the Court in person (T. 262, 263, 289, 290) and the rest of whose testimony was introduced by deposition; 97 retail grocers,

all of whose testimony was offered by deposition; 49 wholesale grocers, 2 of whom appeared in person (T. 263, 288) and the rest of whose testimony was introduced by deposition; and 17 brokers and salesmen representing the Petitioner, 7 of whom appeared before the Court in person, and the rest of whose testimony was introduced by deposition (T. 224, 252, 256, 257, 259, 260, 264). The testimony of these witnesses relates to the understanding, knowledge and practices of such witnesses, but does not present a conflict of evidence which destroys the credibility of any of them.

There were 129 consumer witnesses who had used "Raisin-BRAN" (A. 3a); there were 24 consumer witnesses who testified that the term "Raisin-BRAN" meant the Petitioner's product (A. 3i); and 46 consumer witnesses knew that "Raisin-BRAN" was a product of the Petitioner (A. 3e); 13 consumer witnesses testified that although they did not know the name of the distributor, they did know that prior to the advent of the Post and Kellogg products, there was only one breakfast food designated "Raisin-BRAN" on the market (A. 3d); 50 consumer witnesses identified the Petitioner's product as the only one they have been accustomed to purchase as "Raisin-BRAN," and of these, 45 knew the name of the distributor (A. 3e, 3f); 21 consumers testified that when they wished the Petitioner's product, they asked for "Raisin-BRAN" (A. 3g), and the Trial Court in its opinion said that prior to April 1942, when consumers asked for "Raisin-BRAN" they were supplied with the Petitioner's product (F. 27, T. 155).

There were 54 retailer witnesses who gave evidence that they did a service business and 41 of these witnesses

testified that before the advent of the Post and Kellogg products, their customers called for the Petitioner's product under the designation "Raisin-BRAN" (A. 4f); 26 of these witnesses testified that when their customers asked for just "Raisin-BRAN," they desired the Petitioner's product (A. 4g); and 46 retail grocers testified that the term "Raisin-BRAN" meant the Petitioner's product (A. 4i).

Six of the Petitioner's sales representatives, with wide experience in the trade, and 40 wholesale grocers with equally broad experience testified that prior to the advent of the Post and Kellogg products, the term "Raisin-BRAN" meant Petitioner's product both in the wholesale and retail trade (T. 258, 266, 267, 253, 367, 611; A. 5c).

The Trial Court found that "at all times during the marketing of plaintiff's product, nearly all wholesale dealers in food products and a majority of retail dealers in such products knew that the plaintiff was the distributor of 'Raisin-BRAN' and the only distributor of a product containing like ingredients or having a similar name" (F. 14, T. 146).

A substantial amount of testimony was elicited from the consumer and retail grocer witnesses in answer to the question propounded by Respondent's counsel, "What does the term raisin bran mean to you?" (A. 12a). Most of the witnesses gave their understanding as of a time after General Foods and Kellogg products carrying the designations "Raisin Bran" were on the market and with such competitive products in mind (A. 12b); and many of these witnesses also testified that the term

"Raisin Bran" meant the Petitioner's products, before the advent of the General Foods and Kellogg products (A. 12e); some of these witnesses answered in response to leading and suggestive questions (A. 12d); and others testified without any real knowledge on the subject (A. 12e), or were answering requests for dictionary definitions (A. 12f).

Nine consumers and eleven retail grocers in answer to the question, "Does the term Raisin Bran mean any particular producer or manufacturer?" or words to that effect, answered "No" (A. 12g). And three of these retailer witnesses testified that before the advent of competition the term "Raisin Bran" meant the Petitioner's product (T. 430, 444, 1206-1207); while the evidence of three of these consumer witnesses and four of these retail grocer witnesses showed that they understood the term "Raisin Bran" indicated the Petitioner's product, before the advent of competition (A. 12h); and the testimony of seven out of nine of these consumer witnesses and of eight out of eleven of their retail witnesses shows clearly that they gave such testimony with the General Foods and Kellogg products in mind (A. 12i); and the knowledge of two of the consumer witnesses was so scant as to render their testimony valueless (T. 416, 889).

The testimony of all but a few of the witnesses who answered the questions, "What does Raisin Bran mean to you?" and "Does it mean any particular producer or manufacturer?" shows that the witnesses also understood the trade-mark significance of the term Raisin Bran (A12a).

As soon as Petitioner became aware of Respondent's infringement, Petitioner wrote the Respondent demanding that it cease and desist from using Petitioner's trade-mark "Raisin-BRAN" as a part of the designation of Respondent's product and from using the mark in selling and distributing its product (T. 9). To this Respondent replied, "We do not recognize that you have any exclusive rights in this alleged trade-mark, and even if you did have any exclusive rights in it, we do not think our manufacture and sale of Kellogg's Raisin 40% Bran Flakes infringes such right in any respect" (T. 10). Shortly after receipt of Respondent's letter, the Petitioner filed its complaint.

Trial Court's Conclusions, Findings, Opinion and Decree.

The Trial Court made 64 Findings of Fact (T. 141-170), 35 Conclusions of Law (T. 170-177), wrote an opinion found at 52 Federal Supplement at pages 432-452, and dismissed Petitioner's complaint with prejudice (T. 177).

An examination of the Findings of Fact, Conclusions of Law and Opinion of the Trial Court shows that the Trial Court predicated its Findings of Fact that there was no secondary meaning established by the Petitioner, upon the Court's Conclusions of Law:

- (1) That a term which is composed of two words each of which is descriptive of an important constituent of a product cannot acquire a secondary meaning (52 F. S., pp. 445-448); (2) that the use of the word "bran" in Respondent's trade-mark precluded the mark "Raisin-BRAN" from acquiring a secondary meaning (52 F. S. 448); (3) that a secondary meaning cannot be acquired by a term applied to an unpatented product during the

time when the product to which the term is applied has no competition in the market (52 F. S. 448-449); (4) that the registration of the term "Raisin-BRAN" under the Trade Mark Act of March 1920, was void (C. 11, T. 173); (5) that the term "Raisin-BRAN" did not acquire a secondary meaning because a substantial portion of the consuming public did not know the personal identity of the distributor, even though many of them knew that it was a single thing coming from a single source and some of them actually knew the source of origin; the Court having concluded that the case of *Kellogg Company v. National Biscuit Company*, 305 U. S. 111, governed this case (52 F. S. 449), and that the case of *Coca Cola Co. v. Koke Co.*, 254 U. S. 143, did not (52 F. S. 449-450); (6) that proof of the following character is not sufficient to establish a secondary meaning;—(a) "An exclusive and long continued use of its designation during a period when no competition was in the field; (b) a wide distribution of its product; (c) a wide advertising campaign and large expenditures for advertising the product under the designation; and (d) identification of the product by its designation on the part of a substantial portion of the purchasing public; understanding by a substantial portion of the purchasing public and most of the retail and wholesale trade that the name signifies a single thing coming from a single source and covers a product made and distributed exclusively by the person who claims the brand; a recognition in the product of superior qualities or of excellence by a substantial portion of the purchasing public" (52 F. S. 448); (7) that evidence of those who never heard of the product or who did not know its source of origin or for whom the term had acquired a dual significance, one characterizing the product, the other its

source of origin, or who had been led by the advertising of the Respondent and General Foods to understand that the term applied to any product, negated positive, credible, uncontradicted evidence of many consumers, and retail and wholesale dealers who testified that the term meant the Petitioner's product, or a particular product coming from a single source; (8) that testimony of sales representatives of the Petitioner, with wide experience dealing with the trade, to the effect that in the mind of the consuming public the term "Raisin-BRAN" meant the Petitioner's particular product, and similar testimony of wholesale and retail grocers with wide experience in the trade, was incompetent as proof of a secondary meaning; (9) that there was no likelihood of confusion or palming off, even though there was positive evidence of both; (10) that there was no likelihood of confusion in the future because the Respondent and General Foods engaged in an immediate extensive and intensive newspaper and radio advertising campaign and thereby caused many members of the consuming public to understand that the term applied to any product similar to Petitioner's (52 F. S. 437); (11) that the likelihood of confusion and palming off was to be determined by the reaction of an "ordinary cautious member of the public, using reasonable care and attention in purchasing," and by the Trial Court's "long and careful scrutiny" of the packages containing Petitioner's and Respondent's product (52 F. S. 450), and that such evidence outweighed the positive testimony of credible witnesses who were confused or who had palmed off the Respondent's product for that of the Petitioner; (12) that the use of Respondent's name on Respondent's

package and the use of white packages with green letters similar to other packages long used by the Respondent was sufficient to avoid a charge of unfair competition through the appropriation of Petitioner's trade-mark (52 F. S. 451).

Grounds for Appeal to Circuit Court of Appeals

The Petitioner appealed from this decree and urged as grounds for reversal that, (1) the Trial Court's Findings of Fact which were adverse to the Petitioner are mixed conclusions of law and fact and were predicated upon an erroneous view of the law; (2) the term "Raisin-BRAN," standing alone, as applied to Petitioner's breakfast food product was capable of acquiring a secondary meaning, and the Trial Court erred when it concluded and held otherwise; (3) Petitioner's registration of the term "Raisin-BRAN" under the 1920 Trade-Mark Act was valid, and the Trial Court erred when it concluded and held otherwise; (4) as used by the Petitioner, the term "Raisin-BRAN" acquired a secondary meaning prior to the time that Respondent introduced its competing product, and the Trial Court erred when it concluded and held otherwise; (5) the Respondent was guilty of unfair competition in appropriating and simulating Petitioner's trade-mark "Raisin-BRAN," Petitioner's trade slogan "Cereal and Fruit," and Petitioner's label, and the Trial Court erred when it concluded and held otherwise; (6) the Petitioner is entitled to the relief prayed for, and the Trial Court erred in finding, concluding and decreeing otherwise.

Decision of United States Circuit Court of Appeals, 8th Circuit

The United States Circuit Court of Appeals for the Eighth Circuit, in an opinion found at Transcript Vol. VII, pp. 3-11, affirmed the decision of the Lower Court, predicated its affirmance chiefly upon an approval of the Trial Court's Opinion and the conclusion that under Federal Rule of Practice No. 52, the Findings of the Trial Court that no secondary meaning had been established, that there was no confusion or palming off and no likelihood of confusion or palming off, were binding upon the Appellate Court.

In its opinion the Eighth Circuit Court of Appeals in effect held that the third sentence of Federal Rule of Civil Procedure No. 52 precluded the Appellate Court from reviewing the facts in an equity appeal. The Court also, among other things, held that the question "whether the similarities which exist between the packages used by the appellees and the packages used by appellant have caused or are likely to cause deception and confusion in the trade, is, we think, a question of fact for the Trial Court to determine. *Cleo Syrup Corporation v. Coca Cola Company*, 8th C. C. A., 139 F. 2d 417-418" (T. VII-10).

The Eighth Circuit Court of Appeals predicated its findings of fact and conclusions with respect to the findings of fact of the Trial Court upon an erroneous application of the decision of the Supreme Court in the case of *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 220 U. S. 446, when it said: "A contention that a descriptive trade name had acquired a secondary meaning under a comparable state of facts was rejected by this Court and

the Supreme Court in *Trinidad Asphalt Mfg. Co. v. Standard Paint Co.*, 8th Cir., 163 F. 977, affirmed in *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 220 U. S. 446. * * * It seems to us, as it did to the trial court, that the name 'Raisin Bran' was not shown to have acquired such a secondary significance as would justify denying to the appellees the right to use the words 'Raisin Bran' in describing their product. To preclude the appellees from using these words would be to give the name 'Raisin Bran' the full effect of a trade-mark while denying its validity as such.' *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, supra" (T. VII-9).

This statement of the Court of Appeals is directly in conflict with the following found in Note 24 to the opinion of this Court in the case of *Armstrong Paint & Varnish Works v. Nu-Enamel Corporation*, 305 U. S. 315, 335: "Cf. *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 220 U. S. 446, 461. The language in that case denying to a descriptive term the effect of a trade-mark is inapplicable for the reason that the descriptive term had not acquired a secondary meaning", and the claimant was claiming rights on the basis that the mark "Ruberoid" had technical trade-mark significance.

Petition for Writ of Certiorari

It is from the foregoing decision of the Eighth Circuit Court of Appeals that this Petition for Writ of Certiorari is taken.

II.

Basis upon which it is contended the United States Supreme Court has jurisdiction to review.

This Writ is sought under authority of Section 240 (a) of the Judicial Code (c. 231, Sec. 240 (a), 36 Stat. 1157) as amended February 13, 1925 (c. 229, Sec. 1, 43 Stat. 938; T. 28, Sec. 347 U. S. C.) (A. 14). The jurisdiction of the District Court and United States Circuit Court of Appeals are predicated upon Section 17 of the 1905 Trade-Mark Act (A. 20) and Section 6 of the 1920 Trade-Mark Act (A. 21).

The decision of the United States Circuit Court of Appeals from which this writ is sought was handed down August 4, 1944 (T. Vol. VII, p. 3). This Petition for Writ of Certiorari is presented on September 15, 1944.

The trade-mark "Raisin-BRAN," which is the subject of this controversy, was registered under the Trade-Mark Act of March 19, 1920 (c. 104, 41 Stat. 533) (T. 293); there is a diversity of citizenship between the parties (T. 142, F. 1) and the amount in controversy, exclusive of interest and costs, exceeds \$3,000.00 (T. 142, F. 1).

The opinion of the Eighth Circuit Court of Appeals on account of which this writ of Certiorari is sought is found at pages 3 to 11 of Volume VII of the Transcript of Record in this case. The opinion of the United States District Court, District of Nebraska, in this case is found at 52 Federal Supplement, pages 432 to 452, inclusive.

III.

Questions presented.

1. The Circuit Court of Appeals for the Eighth Circuit erred when it concluded that Federal Rule of Civil Procedure No. 52 precludes a review of the findings

of the Trial Court on an appeal of an equity case (T. Vol. VII, pp. 8-9, 10).

2. The Circuit Court of Appeals for the Eighth Circuit erred when it found that the term "Raisin Bran" was the "primary generic meaning" of Petitioner's breakfast food product (T. Vol. VII, p. 8).

3. The Circuit Court of Appeals erred when it sustained the conclusion of the Trial Court that the case of *Kellogg Company v. National Biscuit Company*, 305 U. S. 111, governed a decision in this case and that the case of *Coca Cola Company v. Koke Company*, 254 U. S. 143, did not (T. Vol. VII, p. 8).

4. The Circuit Court of Appeals for the Eighth Circuit erred when it concluded and held that the term "Raisin-BRAN" could not acquire a secondary meaning for the reason that it was composed of two words which were descriptive of the two principal ingredients of the product to which it was applied (T. Vol. VII, pp. 7-9).

5. The Circuit Court of Appeals for the Eighth Circuit erred when it approved the Trial Court's Opinion, in which it was concluded that a trade-mark or trade term could not acquire a secondary meaning during the time the product to which it was applied had no competition in the market (T. Vol. VII, pp. 8-9).

6. The Circuit Court of Appeals for the Eighth District erred when it approved the Trial Court's Opinion in which it was concluded that the following proof would not be sufficient to establish a secondary meaning: "(a) An exclusive and long continued use of its designation during a period when no competitor was in the field; (b) a wide distribution of its product; (c) a wide adver-

tising campaign and large expenditures for advertising the product under the designation; and (d) identification of the product by its designation on the part of a substantial portion of the purchasing public; (e) understanding by a substantial portion of the purchasing public and most of the retail and wholesale trade that the name signifies a single thing coming from a single source and covers a product made and distributed exclusively by the person who claims the brand; (f) a recognition in the product of superior quality or excellence by a substantial portion of the purchasing public" (52 F. S. 448) (T. Vol. VII, p. 8).

7. The Circuit Court of Appeals for the Eighth Circuit erred when it approved the Trial Court's Opinion in which it was concluded that the testimony of sales representatives of the Petitioner, with wide experience dealing with the trade, to the effect that in the mind of the consuming public the term "Raisin-BRAN" meant the Petitioner's particular product, and similar testimony of wholesale and retail grocers with wide experience in the trade, was incompetent as proof of a secondary meaning.

8. The Circuit Court of Appeals for the Eighth Circuit erred when it held that the term "Raisin-BRAN" had not acquired a secondary meaning and that it was bound by the Trial Court's finding to that effect (T. Vol. VII, p. 9).

9. The Circuit Court of Appeals for the Eighth Circuit erred when it concluded that the Respondent had the right to designate its product "Raisin Bran."

10. The Trial Court erred when it found that the Respondent, by placing its own name "Kellogg's" on its

package and packaging its product in a package with white background and dark green lettering and the word "Kellogg's" in red, had done all that was necessary to distinguish its product from that of Petitioner; and the Eighth Circuit Court of Appeals erred when it concluded that such findings were binding upon the Appellate Court (T. Vol. VII, p. 10).

11. The Trial Court erred in its finding that the proof did not show confusion and palming off of Respondent's product for the product of the Petitioner; and the Eighth Circuit Court of Appeals erred in concluding that such findings of the Trial Court were binding upon the Appellate Court.

12. The Trial Court erred when it found that there was no likelihood of confusion and palming off; and the Eighth Circuit Court of Appeals erred when it concluded that such findings were binding upon the Appellate Court.

13. The Trial Court erred when it concluded that the equities in the case were in favor of the Respondent and against the Petitioner; and the Eighth Circuit Court of Appeals erred when it affirmed such a conclusion.

14. The Trial Court erred when it failed to grant the Petitioner the relief prayed for; and the Eighth Circuit Court of Appeals erred when it affirmed the opinion and decision of the Trial Court.

IV.

Reasons Relied Upon for Allowance of Writ

The questions involved in this proceeding are of substantial national importance, to wit:

(1) An interpretation is sought of that sentence of Federal Rule of Civil Procedure 52 which reads "Findings of fact shall not be set aside unless clearly erroneous" (A. 15). There is a conflict between the decisions of the Eighth Circuit Court of Appeals with respect to a proper interpretation of that sentence as shown by the opinion in this case (T. Vol. VII, pp. 8-9, 10) and the opinion in *Cleo Syrup Corporation v. Coca Cola Company*, 8th C. C. A., 139 F. 2d 416, and the following decisions in other Circuits: *Eastern Wine Corporation v. Winslow-Warren, Ltd., Inc.*, 2nd C. C. A., 137 F. 2d 955; *Pfeifer Oil Transportation Co., Inc., v. The Ira S. Bushey, et al*, 2nd C. C. A., 129 F. 2d 607; *Kuhn v. Princess Lida of Thurn & Taxis*, 3rd C. C. A., 119 F. 2d 704; *Texas Agricultural Assn. of Edinburg, et al v. Hidalgo Co. Water Control Improvement District, et al*, 5th C. C. A., 125 F. 2d 829; *Jarvis, Postmaster v. Shackleton Inhaler Co.*, 6th C. C. A., 136 F. 2d 116; *Equitable Life Assurance Society of the United States v. Irelan*, 9th C. C. A., 123 F. 2d 462; and this Court has never rendered any final decision in the matter.

(2) A determination is sought as to whether or not a trade name which is composed of words descriptive of one or more of the ingredients, or of the qualities or uses, of an unpatented product, and which product may be aptly designated by another term, may acquire a secondary meaning which will entitle the owner to protection against substantially the exact use of said term by a competitor. There is a conflict between the decision of the Eighth Circuit Court of Appeals in this case on this question, and the decisions of the Second, Third and Sixth Circuits in the following cases: "Spunlo," *Indus-*

trial Rayon Corporation v. Dutchess Underwear Corporation, 2nd C. C. A., 92 F. 2d 33; "Dyanshine," *Barton v. Rex Oil Co.*, 3rd C. C. A., 29 F. 2d 474; "Coca-Cola," *Nashville Syrup Co. v. Coca-Cola Co.*, 6th C. C. A., 215 F. 527; "Hot-Patch," *Shayler Co. v. Rite-Way Products, Inc.*, 107 F. 2d 82.

(3) A determination is sought as to whether or not a secondary meaning may be acquired for a trade name or trade-mark applied to an unpatented product during a period when there is no competition in the market with such product. There are conflicting decisions with respect to this question between the Eighth Circuit Court of Appeals and the Sixth Circuit Court of Appeals. In its opinion in this case, the Eighth Circuit Court of Appeals approved the opinion of the District Court, in which opinion the Trial Court quoted with approval from *Kellogg Toasted Corn Flake Company v. Quaker Oats Company*, 6th C. C. A., 235 F. 657, 665, 666, to the effect that secondary meaning may not be established in a trade-mark or trade name during a period when no one else was either making or dealing in the article to which the mark was applied; whereas in the case of *Saalfeld Publishing Co. v. G. & C. Merriam Co.*, 238 F. 1, in Note 3 at the bottom of page 9, the Sixth Circuit Court of Appeals says: "Where an article is put out under a trade name which, although it may be called descriptive, is yet also something more than merely descriptive, and where the public is free to compete in the same article and in the same name, but for a long period refrains from both, this seems to the writer the ideal soil in which the secondary meaning may grow into effective existence. The name points to one maker only without confusion or

uncertainty and it is a sure 'badge of origin'"; this Court has never rendered a decision on this question.

(4) There appears to be a conflict of decisions between the following statements made in opinions of this Court, to wit:

"The name now characterizes a beverage to be had at almost any soda fountain. It means a single thing coming from a single source and well known to the community. It hardly would be too much to say that the drink characterizes the name as much as the name the drink. In other words, Coca Cola' probably means to most persons the plaintiff's familiar product, to be had everywhere, rather than a compound of particular substances. * * * We see no reason to doubt that, as we have said, it has acquired a secondary meaning in which, perhaps, the product is more emphasized than the producer but to which the producer is entitled."

Coca Cola Co. v. Koke Co., 254 U. S. 143, 146.

"But to establish a trade name in the term 'Shredded Wheat' the plaintiff must show more than a subordinate meaning which applies to it. It must show that the primary significance of the term in the minds of the consuming public is not the product but the producer."

Kellogg Company v. National Biscuit Co., 305 U. S. 111, 118.

The opinion in the latter case does not sufficiently distinguish the difference in facts between the Coca Cola case and the Shredded Wheat case to make clear the distinctions between the rules laid down in the two cases, and when one rule should apply or when the other, and such distinction has never been clearly pointed out by this Court.

(5) A determination is sought as to what character of proof will establish a secondary meaning in a trade name or trade-mark. There is a conflict between the decision of the Eighth Circuit Court of Appeals in this case on this question and the decisions of the Third, Fourth and Sixth Circuits in the following cases: *Barton v. Rex Oil Co.*, 3rd C. C. A., 29 F. 2d 474 (2 F. 2d 402); *Coca Cola v. Old Dominion Beverage Corporation*, 4th C. C. A., 271 F. 601; *Little Tavern Shops v. Davis*, 4th C. C. A., 116 F. 2d 903, 906; *Grocers Baking Co. v. Sigler*, 6th C. C. A., 132 F. 2d 498.

(6) The issues of fact and law in this case which are raised by the evidence, pleadings and opinions of the Lower Courts, are so comprehensive that they will permit of a decision which will clarify the law of unfair competition as it relates to trade-marks and trade names composed of surnames, geographic names or terms containing words descriptive of the contents or uses of the products to which such terms are applied.

(7) There are many decisions relating to the law of unfair competition as it relates to trade-marks and trade names composed of surnames, geographic names or terms containing words descriptive of the contents or uses of the products to which such terms are applied; on cursory examination, many of these decisions seem to be conflicting, and there is no decision which has clearly pointed out the distinctions by which these numerous decisions may be reconciled and their applicability to any particular set of circumstances determined. The issues of fact and law in this case which are raised by the pleadings, evidence and opinions of the Lower Courts are so comprehensive that they will permit a decision which will

reconcile the numerous decisions on the questions raised, and make clear their applicability to any particular set of circumstances.

(8) The determination of this case will affect a substantial portion of the grocery trade and purchasing public in all parts of the United States.

Respectfully submitted,

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